

Date: July 22, 1997

Case No.: 96-INA-13

In the Matter of:

J.B. HUNT TRANSPORT, INC.,  
Employer

On Behalf Of:

PETER GIESEN,  
Alien

Before: Holmes, Huddleston, and Neusner  
Administrative Law Judges

RICHARD E. HUDDLESTON  
Administrative Law Judge

### **DECISION AND ORDER**

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,<sup>1</sup> and any written argument of the parties. 20 C.F.R. § 656.27(c).

### **Statement of the Case**

On August 22, 1994, J.B. Hunt Transport, Inc. ("Employer") filed an application for labor certification to enable Peter H. Giesen ("Alien") to fill the position of Tractor/Trailer Driver (AF 29-29a). The job duties for the position are:

Job duties include operation of a commercial, combination, Class A vehicle delivering interstate freight and requires that drivers must;  
Meet all Federal and State requirements for certification.  
Have a CDL license with Hazardous Material Endorsement.  
Have current DOT physical which meets 391.41.  
Have favorable references from previous training and work experience.  
Be a minimum of 23 years of age.

The requirements for the position are listed under job duties. Other Special Requirements are listed on the Essential Job Functions sheet located at page 32a of the Appeal File.

The CO issued a Notice of Findings on March 9, 1995 (AF 18-22), proposing to deny certification on the grounds that the Employer is not in compliance with the regulations at § 656.21(b)(5) because the Alien does not have the experience required by the Employer. Specifically, the Employer has provided no documentation to show that the Alien has a CDL license with Hazardous Material Endorsement, or that he has had a current DOT physical which meets 391.41. Accordingly, the CO found that the Employer has not documented the minimum acceptable requirements of the job. Additionally, the CO requested the Employer to provide documentation to show that the Alien is subject to, or has been screened for drugs.

Next, the CO proposed denial of certification on the grounds that the Employer is in violation of § 656.20(g)(ii) because the Employer has: (1) failed to provide the actual dates of the notice posting; (2) stated a wage offer in its posting of \$300 per week but noted on the application a wage offer of \$350 per week for the Alien; and, (3) the IMMACT 90 statement included at the bottom of the posting is deficient as the Employer instructed U.S. applicants to contact either the Alien Certification Unit in Little Rock, Arkansas or the CO in Dallas, Texas - the application was filed in Georgia which is part of the Atlanta Regional Office, not in Arkansas.

Accordingly, the Employer was notified that it had until April 13, 1995, to rebut the findings or to cure the defects noted. On March 20, 1995, the Employer requested an extension of time to file its rebuttal (AF 17a). On April 3, 1995, the CO granted the request until April 26, 1995 (AF 17).

---

<sup>1</sup> All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

The Employer submitted its rebuttal on April 25, 1995 (AF 12-16), which consisted of a copy of a corrected job opening notice and physical examination and drug screen reports as specified by DOT.

The CO issued the Final Determination on May 2, 1995 (AF 10-11), denying certification because the Employer has failed to provide the requested documentation to show that the Alien possessed all of the requirements required of U.S. workers in its job offer. Additionally, the CO found that the Employer has failed to make the required changes to the new internal posting, which means that there is no way a good-faith recruitment effort has been made.

On May 30, 1995, the Employer requested reconsideration of the Denial of Labor Certification (AF 2a-9). The CO denied reconsideration on August 31, 1995 (AF 2). On September 12, 1995, the Employer requested review of the denial of labor certification (AF 1), and the CO forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board") on October 3, 1995.

### **Discussion**

Section 656.21(b)(5) addresses the situation of an employer requiring more stringent qualifications of a U.S. worker than it requires of the alien. Specifically, it provides:

The employer shall document that its requirements for the job opportunity, as described, represent the employer's actual minimum requirements for the job opportunity, and the employer has not hired workers with less training or experience for jobs similar to that involved in the job opportunity or that it is not feasible to hire workers with less training or experience than that required by the employer's job offer.

In this case, the CO, in the NOF, found that the Employer added requirements for U.S. workers, but failed to provide documentation to show that the Alien met the same requirements (AF 21). As such, the CO requested that the Employer provide certain documentation. Specifically, the CO asked that the Employer provide documentation establishing that the Alien has a CDL license with Hazardous Material Endorsement, that the Alien has had a DOT physical which meets 391.41, and that the Alien is subject to, or has been screened for drugs. The CO further asked the Employer to submit a copy of 391.41, as it relates to having a DOT physical. Finally, the CO asked if the Alien was working for the Employer at that time.

In its rebuttal, the Employer provided a copy of the Alien's drug screen testing, along with a copy of his current DOT physical (AF 14-16). However, the Employer did not include a copy of 391.41. Moreover, the Employer did not provide documentation establishing that the Alien has his CDL license with Hazardous Material Endorsement. Finally, the Employer did not state whether the Alien is currently working for the Employer.

If the CO requests a document which has a direct bearing on the resolution of an issue and it is obtainable by reasonable efforts, the employer must produce it. *Gencorp*, 87-INA-659 (Jan. 13, 1988) (*en banc*). An employer's failure to produce a relevant and reasonably obtainable

document requested by the CO is grounds for the denial of certification. *STLO Corporation*, 90-INA-7 (Sept. 9, 1991); *Oconee Center Mental Retardation Services*, 88-INA-40 (July 5, 1988). This is especially true where the employer does not justify its failure. *Vernon Taylor*, 89-INA-258 (Mar. 12, 1991). As noted above, the Employer in this case failed to produce several documents specifically requested by the CO. Furthermore, the Employer did not justify its failure to produce the documents. We note that the Employer submitted additional evidence in conjunction with its Request for Review (AF 2-9). However, it is well-settled that evidence first submitted with a Request for Review will not be considered by the Board. *Capriccio's Restaurant*, 90-INA-480 (Jan. 7, 1992); *Kogan & Moore Architects, Inc.*, 90-INA-466 (May 10, 1991). The Employer was specifically notified in the NOF that, "The rebuttal evidence must answer fully and specifically each citation contained in the NOTICE OF FINDINGS. Any citation that is not satisfactorily and fully answered will result in the application being automatically denied." (Emphasis in original.) (AF 19). As such, the Employer was fully aware that it was expected to provide all relevant evidence in conjunction with its rebuttal.

Based on the foregoing, we find that the CO's determination is reasonable and supported by substantial evidence contained in the record. Accordingly, the CO's denial of labor certification is hereby **AFFIRMED**.<sup>2</sup>

### **ORDER**

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

---

RICHARD E. HUDDLESTON  
Administrative Law Judge

**NOTICE OF PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary

---

<sup>2</sup> We further note that the Employer failed to correct a deficiency in its job posting as requested by the CO in the NOF (AF 22). However, in its Request for Review, the Employer stated that it posted the job offer a third time with the correct IMMACT 90 statement (AF 2). Because we have affirmed the CO's denial on the Employer's failure to submit documentation specifically requested by the CO in the NOF, we find it unnecessary to discuss this deficiency and subsequent correction.

to secure or maintain uniformity of its decision; and, (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

***Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, N.W., Suite 400  
Washington, D.C. 20001-8002***

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.